pose of restraining interstate commerce. Though that act might of itself create a monopoly, it might also be so far from achieving that end as to be mere preparation, which is not enough to constitute a legal attempt. The attempt to monopolize obviously need not include the element of combination. Consequently, the objection on the ground of double jeopardy was overruled. *United States* v. *MacAndrews and Forbes Co.*, 149 Fed. Rep. 836 (Circ. Ct., S. D. N. Y.).

A futile attempt was made to place the above case in that class where one transaction is improperly split up into several crimes of the same kind. Thus, if a man in one transaction steals goods belonging to several different owners, it is possible to form several indictments, each charging the theft of a different article owned by a different person. The ordinary test of identity of offenses — whether the facts necessary to support the first indictment would warrant a conviction under the second — would not prevent a conviction under each indictment. And that is the result reached by some courts.[7] But it is clear that the state has been injured but once; and where there is only one transaction and one injury to the state, the offenses are identical within the meaning of the double jeopardy guaranty.[8]

PREVENTION OR HINDRANCE BY PROMISEE AS AN EXCUSE FOR NON-PERFORMANCE. — The performance of a contract may be prevented or hindered by the promisee's failure to supply co-operation agreed upon, or by his active interference, intentional or unintentional. Where the promisor's ability to perform depends on some positive act of the promisee, necessary as a prerequisite, the latter's breach of the agreement to co-operate actively so absolutely prevents performance that the defense might well be called impossibility, if the confusing applications of this term had not made use of it objectionable.[1] Clearly the promisor's non-performance should here be excused, whether the promisee's agreement actively to co-operate be express[2] or implied.[3] On the other hand, even when the promisee is under no such obligation, his passive co-operation may be an important element, and if he prevents, hinders or harasses the attempted performance of the promisor, in many situations he may not be entitled to succeed in an action for non-performance. A general theory of defense applicable to this alternative case, however, can be satisfactorily established neither by implying a promise on the part of the promisee to refrain from interfering with the promisor's performance, nor by merely allowing so-called impossibility to excuse.

Should the promisor expressly or impliedly, as in dealings on the stock exchange, assume the risk of absolute prevention[4] or hindrance[5] of performance by the promisee, he should, of course, have no defense in the event of such interference. But usually the promisor assumes no such risk.

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[7] Reg. *v.* Brettel, C. & M. 609.
[8] Hoiles *v.* U. S., 3 MacArthur (D. C.) 370.

[1] *Cf.* 19 HARV. L. REV. 462.
[2] McKee *v.* Miller, 4 Blackf. (Ind.) 222.
[3] Murphy *v.* Black, 78 Mo. App. 316; Atchinson *v.* Williams, 28 Tex. 599; Mackay *v.* Dick, 6 App. Cas. 251, 263.
[4] See Chicago, etc., Ry. *v.* Hoyt, 149 U. S. 1, 14, 15; Dolan *v.* Rodgers, 149 N. Y. 489, 491.
[5] *Cf.* Murdock *v.* Caldwell, 10 Allen (Mass.) 299.

When the promisee purposely blocks him so as to make performance impossible, whether this is effected by forcible [6] prevention or by adversely [7] controlling or affecting a *sine qua non* of the contract, the promisor should be excused. This is equally so when the complete obstruction is unintentional [8] or indirect.[9] When the promisee does not prevent, but purposely hinders [10] performance, so that it is possible only by greater effort or expense, the promisor should again be excused. But when the hindrance is unintentional, it may well be doubted whether, as an inflexible rule, it should excuse the promisor. The necessary exceptions [11] can be determined by applying the principle underlying the preceding defenses. It is not a theory of legal interpretation of the contract, nor the limited equitable defense of impossibility, but an extension of equitable defenses at law to include the idea that parties to a contract should be required to deal fairly with each other.[12] When, therefore, the defense of prevention or hindrance is raised by the promisor, the question is not only what were the terms of the contract, but whether, in the particular circumstances, the situation is such that a reasonable man would consider it unfair to the promisor to hold him accountable for non-performance.[13]

A defense of this nature might have been allowed in a recent case where, owing to the negligence of the promisee's representatives, the lease of a quarry, from which the promisor contemplated supplying stone called for under the contract, expired before the promisor could have performed. The court allowed recovery on the ground that performance was not thereby made impossible.[14] *United States* v. *Conkling & The Fidelity, etc., Co.*, 37 N. Y. L. J. 129 (C. C. A., Second Circ., March, 1907). But a failure to allow a defense on a ground short of impossibility not only may work injustice, as in the present case, but would seem to involve the harsh implication that a promisee may succeed even when he hinders and obstructs the promisor purposely, so long as he does not prevent performance absolutely.

RECENT CASES.

ADVERSE POSSESSION — AGAINST WHOM TITLE MAY BE GAINED — PUBLIC CORPORATION INVESTED WITH TITLE OF PUBLIC SCHOOLHOUSE SITES. — A state statute, framed to establish and maintain a system of free schools, made the trustees of schools of each township a body politic and corporate, and invested it with the title and care of the schools and the schoolhouse sites. The appellee, such a corporation, brought ejectment against the appellant, who had occupied part of a schoolhouse site adversely for more than twenty years. *Held*, that the statute of limitations is a good defense. *Brown* v. *Trustees of Schools*, 224 Ill. 184.

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[6] Jarrell *v.* Farris, 6 Mo. 159. Under the early common law the promisor was excused only in case of forcible prevention. 1 Rolle Abr. 453 N; Co. Litt. 206 *b*; Fraunce's Case, 8 Coke 89, 92.

[7] Connelly *v.* Devoe, 37 Conn. 570; King *v.* King, 69 Ind. 467.

[8] United States *v.* Peck, 102 U. S. 64. For the promisor's right of recovery for loss, see Peck's Case, 14 Ct. Cl. (U. S.) 84.

[9] Murray *v.* Kansas City, 47 Mo. App. 105.

[10] Taylor *v.* Risley, 28 Hun (N. Y.) 141.

[11] *Cf.* Patterson *v.* Gage, 23 Vt. 558.

[12] Taylor *v.* Risley, *supra*.

[13] See Anvil Mining Co. *v.* Humble, 153 U. S. 540, 552.

[14] *Cf.* Fidelity, etc., Co. *v.* U. S., 137 Fed. Rep. 866.